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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

No. 83-6186

IN THE MATTER OF

RALPH CLAPP ROGERS,

Respondent.

On Appeal From The

Supreme Court of North Carolina

Motion To Dismiss Appeal

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IN THE
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No. 83-6186

IN THE MATTER OF

RALPH CLAPP ROGERS,

Respondent.

Motion To Dismiss Appeal

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, respectfully moves this Honorable Court to dismiss the above-captioned appeal on the ground that the appeal fails to present any substantial federal question and that consequently this case is not one for appeal.

OPINIONS BELOW

The judgment of the Supreme Court of North Carolina is reported in 309 N.C. 633, 308 S.E. 2d 716 (1983). The opinion of the North Carolina Court of Appeals is reported in 63 N.C. App. 705, 306 S.E. 2d 510 (1983).

STATEMENT

This is a direct appeal from the judgment of the Supreme Court of North Carolina filed on November 3, 1983, which denied appellant's petition for discretionary review and allowed the state's motion to dismiss the appeal for lack of a substantial constitutional question. By its order, the North Carolina Supreme Court denied further review of the opinion of the North Carolina Court of Appeals which affirmed the order entered 19 August 1982 in Granville County District Court. The Court of Appeals had found that appellant's release from the treatment facility was governed

by the amended statute in question as a matter of state law and that the statute thus applied did not deprive appellant of his constitutional rights.

Here, appellant was found incapable of proceeding to trial in Granville County Superior Court on charges of murder and crime against nature with mankind on November 9, 1978. Pursuant to N.C. Gen. Stat. § 15A-1003(a)(1975), the court's order directed that involuntary commitment proceedings be initiated, and that a magistrate should thus issue an order to the Granville County Sheriff's Department to take appellant into custody and be examined by a local physician. Appellant was admitted to John Umstead Hospital, a state-operated psychiatric facility, on the next day as a result of these proceedings. At an involuntary commitment hearing held on November 16, 1978, appellant was committed by order of Granville County District Court to Umstead Hospital, where by virtue of numerous subsequent rehearings he has remained continuously on an involuntary basis every since.

Subsequently, a third or more rehearing was held in this matter on July 17, 1982 in Granville County District Court before the Honorable C. W. Allen, Jr., Chief District Judge, pursuant to N.C. Gen. Stat. § 122-58.11 (1981). After hearing the evidence, the court entered an order finding appellant to be mentally retarded with a behavior disorder and dangerous to self and others and committing him for another period of 365 days. Neither notice of appeal nor exception was taken by appellant to this order. At this hearing, the State through the Attorney General made an oral motion for the order of commitment to indicate that the commitment proceedings had been initiated pursuant to N.C. Gen. Stat. § 15A-1003(a)(1975) as a result of appellant's being charged with a violent crime and appellant had been

found incapable of proceeding to trial on the charges. Upon appellant's objection the court took the matter under advisement and requested that briefs be submitted by both parties on this issue. The court subsequently entered an order dated August 19, 1982 allowing the State's motion and placing appellant's case within the scope of the 1981 amendment to Article 5A of the General Statutes. Appellant's appeals to the Court of Appeals and Supreme Court of North Carolina were based solely upon this order of August 19, 1982.

In June, 1981 the North Carolina General Assembly ratified House Bill 95, entitled "An Act to Provide Judicial Review of a Psychiatrist's Determination to Release an Involuntarily Committed Mental Patient Who Has Committed Violent Acts," to become effective July 1, 1981. 1981 N.C. Sess. Laws 808, amended by 1983 N.C. Adv. Legis. Serv. ch. 380. That Act amended Chapter 122 of the North Carolina General Statutes to provide that when commitment proceedings were initiated as a result of the respondent's being charged with a violent crime, and the respondent was found either not guilty by reason of insanity or incapable of proceeding, the commitment order should so indicate. N.C. Gen. Stat. § 122-58.8(b)(Supp. 1983). A special set of procedures were made applicable to this set of respondents, including a requirement that the Clerk of Superior Court must notify the chief district judge, clerk of superior court and district attorney in the originating county of the time and place of every rehearing in such cases. N.C.Gen.Stat. § 122-58.11(a)(Supp. 1983). The sole change created by the amendment which affected appellant, however, was the provision for a court hearing to determine the appropriateness of releasing a respondent previously charged with a violent crime. Thus, N.C.Gen. Stat. § 122-58.13(b)(Supp. 1983) as amended states that for such a respondent:

> 15 days before the respondent's discharge or conditional release the chief of medical services of a public or private mental health facility shall notify the clerk of the county in which the facility is located of his determination that the respondent is no longer in need of hospitalization. The clerk must then schedule a rehearing to determine the appropriateness of respondent's release under the standards of commitment set forth in G.S. 122-58.8. The clerk shall give notice as provided in G.S. 122-58.11(a). The district attorney of the district where respondent was found not guilty by reason of insanity or incapable of proceeding may represent the State's interest at the hearing.

The venue of either an initial hearing or subsequent rehearing in such cases shall be moved to the county in which the criminal proceedings were held "when the convenience of witnesses and the ends of justice would be promoted by the change." N.C.Gen.Stat. § 122-58.7A(c)(Supp. 1983). Appellant now contends that the application of this statutory provision to the facts of this case violates his constitutional rights and presents a substantial federal question warranting appeal to this Court.

QUESTIONS PRESENTED

I. Is there a substantial Federal question involved where state statutes require a court hearing to determine the appropriateness of releasing a civilly committed respondent previously charged with a violent crime and found incapable of proceeding or not guilty by reason of insanity, although other committed respondents may be released without a judicial determination but based upon the same standard of commitment?

II. Is there a substantial Federal question involved where, under the facts of this case, state statutes require a court hearing to release a civilly committed respondent previously charged with a violent crime and found incapable of proceeding, although the respondent has already been charged, found incapable of proceeding and civilly committed prior to the effective date of the statutes in question?

ARGUMENT

I. There is no substantial Federal question involved where state statutes require a court hearing to determine the appropriateness of releasing a civilly committed respondent previously charged with a violent crime and found incapable of proceeding or not guilty by reason of insanity, although other committed respondents may be released without a judicial determination but based upon the same standard of commitment.

Appellant first contends that this case involves a substantial federal question on the grounds that N.C. Gen. Stat. § 122-58.7A, et seq. (1981) as applied to a person charged with a violent crime and found incapable of proceeding to trial violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. As discussed above, N.C.Gen.Stat. § 122-58.13(b) (1983) provides that if a respondent was initially committed as a result of being charged with a violent crime, and he was found not guilty by reason of insanity or incapable of proceeding, the mental health facility must notify the clerk of superior court of the determination that respondent is no longer in need of hospitalization fifteen days prior to respondent's planned release. The clerk must then schedule a court hearing to determine the appropriateness of respondent's release under the standards of commitment governing all civilly committed respondents. See N.C.Gen. Stat. §§ 122-58.13(b), .8(a)(1983).

Appellant concedes in his Jurisdictional Statement that the State of North Carolina may properly apply these procedures requiring a court hearing for release to respondents who have been found not guilty by reason of insanity, since placing these individuals within this class is reasonably related to the object of the legislation. This question is well settled and needs no further discussion here. See Benham v. Edwards, 678 F. 2d 511 (5th Cir. 1982), vacated and remanded, _____U.S._____, 103 S.Ct. 3565, 77 L.Ed. 2d 1406 (1983); Powell v. Florida,

579 F. 2d 324 (5th Cir. 1978). Moreover, Jones v. United States, _____U.S._____, 103 S.Ct. 3043, 77 L.Ed. 2d 694 (1983), this Court recently addressed the rights of persons found not guilty by reason of insanity and subsequently committed to a psychiatric facility. The Court held that when a criminal defendant is found not guilty by reason of insanity, the Constitution permits the state to confine him to a mental hospital until such time as he has regained his sanity or is no longer a danger to himself or others, and due process does not require the same standard of proof or other procedural safeguards that are called for in the normal commitment situation. See Bolton v. Harris, 395 F. 2d 642 (D.C.Cir. 1968); People v. Giles, 192 Colo. 240, 557 P. 2d 408 (1976); State ex rel. Kovach v. Schubert, 64 Wis. 2d 612, 219 N.W. 2d 341 (1974).

Clearly the equal protection clause of the United States Constitution does not take from the state the power to classify persons when there is a reasonable relation between the classification and the object of the statute. Carrington v. Rash, 380 U.S. 89 (1965); Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459 (1937). When an equal protection claim does not involve a "suspect class" or the exercise of a fundamental right, the distinctions drawn by the challenged statute must merely bear some rational relationship to a conceivable legitimate governmental interest. New Orleans v. Dukes, 427 U.S. 297 (1976); Hagans v. Lavine, 415 U.S. 528 (1974). Perfection is not required for purposes of equal protection analysis under the standard which inquires whether a classification is rationally related to furthering a legitimate state interest. Vance v. Bradley, 440 U.S. 93 (1979).

In French v. Blackburn, 428 F. Supp. 1351 (M.D.N.C. 1977), aff'd. 443 U.S. 901 (1979), the civilly committed respondent contended that his right to equal protection of the laws had

been denied because he was not entitled to a jury trial in involuntary commitment proceedings, whereas such was available to those persons subjected to lunacy proceedings under N.C.Gen. Stat. § 35-2 for the appointment of a guardian. The three judge panel of the United States District Court rejected this argument in part upon the grounds that these two classes of persons were not similarly situated for purposes of equal protection analysis. The court went on, however, to state that even if the classification did affect persons similarly situated, the rational basis test would be applied and that the statutory differences in treatment would meet that test. Thus, the rational basis test is applied to involuntary commitment proceedings, unless the challenged statute classifies persons in terms of the exercise of a fundamental right or on some "suspect" basis. See French v. Blackburn, id.; New Orleans v. Dukes, 427 U.S. 297 (1976). Clearly the rational basis test would apply here based on the facts of the instant case.

Although conceding that those found not guilty by reason of insanity may reasonably be included in this classification, appellant contends that as it affects those found incapable of proceeding this classification is not reasonable and is without any substantial relation to the object of the legislation. To comport with the requirements of equal protection, a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).

Appellant cites Jackson v. Indiana, 406 U.S. 715 (1972), for the proposition that one who has been charged with a crime

and found incapable of proceeding cannot be treated as a special class for the purposes of civil involuntary commitment. That case involved a state statute which provided for a more lenient commitment standard and a more stringent standard of release for that class of persons than those standards applicable to persons not charged with offenses. The challenged statute, by committing the defendant until "sane," in effect committed him indefinitely solely on account of his lack of capacity to stand trial. On this basis this Court held that these procedures condemning the petitioner in Jackson to permanent institutionalization without the showing required for commitment or an opportunity for release deprived him of equal protection of the laws. The Court stated further that a person charged with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held for more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain capacity in the near future. If it is determined that this is not the case, then the state must either institute the customary civil commitment proceeding or release the defendant. But cf. Jones v. United States, _____U.S._____, 103 S.Ct. 3043, 77 L.Ed. 2d 694 (1983)(indefinite civil commitment constitutional for persons acquitted by reason of insanity).

Unlike the Indiana procedures challenged in Jackson, however, the provisions of N.C.Gen. Stat. § 122-58.7A, et seq. (1983) do not allow a respondent to be committed because of his incapacity to proceed. Instead,North Carolina law requires that such a respondent must be civilly committed according to the same standard applicable in the case of any non-criminal. See N.C.Gen.Stat. § 122-58.8 (1983). Nor do the applicable state statutes permit an indefinite commitment "until sane" as did those at issue in Jackson. Periodic rehearings pursuant to N.C. Gen.

Stat. § 122-58.11(1983) must be held for those who fall under the 1981 amendment as for all other committed respondents, and the same standard of commitment applied initially must again be met at each rehearing.

Appellant contends that to include those found incapable of proceeding within the statutory classification as well as those found not guilty by reason of insanity does not bear a fair and substantial relation to the object of the legislation. The legislation enacting the amendment was entitled "An Act to Provide Judicial Review of a Psychiatrist's Determination to Release an Involuntarily Committed Mental Patient Who Has Committed Violent Acts." 1981 N.C. Sess. Laws 808. Accordingly, a primary purpose of the Act was to provide for judicial monitoring of the release of such patients. This amendment was enacted in an attempt to redress a perceived imbalance in the current laws, which permitted psychiatrists at a treatment facility to discharge outright a patient who had been charged with a violent crime and had been committed through the criminal justice system.

As conceded by appellant in the court below, the statutory amendment does not alter the standard of commitment to render release of such patients more difficult than release of any other committed patient. Instead, it merely insures that the officials in the community who were responsible for the initiation of commitment are notified of all rehearings, so that a full and fair hearing can be held to determine the appropriateness of the patient's recommitment or release. Nor would the requirement that the chief of medical services request a rehearing fifteen days before the respondent's planned discharge be unreasonable. See French v. Blackburn, 428 F.Supp. 1351. Clearly the legislative purpose behind the amendment has been accomplished

by this enactment.

Appellee also notes that courts in other jurisdictions have upheld statutory procedures providing for a judicial determination of the appropriateness of release in such cases. An example is a New York statute which provides that when a defendant is in the custody of the commissioner of mental hygiene after being found incapable of proceeding to trial, he may not be discharged, conditionally released or placed on any temporary pass unless written notice is delivered at least four days in advance of the change of status to the district attorney in the county where the person was committed and to other appropriate persons. N.Y. Crim. Proc. Law § 730.60(6)(a)(McKinney 1982). The district attorney may apply for an order directing a hearing to be held within ten days to determine whether the committed person is a danger to himself or others. Id. § 730.60(6)(c).

In People v. Jones, 114 Misc. 2d 31, 449 N.Y.S. 2d 409 (1982), the New York Supreme Court concluded that to permit the district attorney to have a hearing prior to any change in the respondent's status would not violate the respondent's constitutional rights. In refusing to apply a strict construction to weaken the statute's requirement of notice and hearing, the court observed that the purpose of the law in requiring notice and hearing prior to release was "to protect the public safety by applying closer scrutiny to any changes in status proposed in regard to incapacitated defendants...." Id. at_____, 449 N.Y.S. 2d at 412. The court further stated as follows:

> "The public acquires a special interest in their confinement and release, which therefore must be considered by the Court. When consideration is being given to the release of such a person, that public interest must be weighed against the claimed right to be set free."
>
> . . . .
>
> This Court held in People v. Bradley Wesson, August 14, 1981, that the District

Attorney was entitled to a hearing noting that "[i]t would serve no purpose to require the mental facility to give notice to the People of their intention to release the patient without giving the People the right to a hearing."

Id. at ____, 449 N.Y.S. 2d at 413. See People v. Jones, 112 Misc. 2d 841, 447 N.Y.S. 2d 612 (1982); see also, People v.Arendes, 92 Misc. 2d 372, 400 N.Y.S. 2d 273 (1977).

In its opinion below, the North Carolina Court of Appeals held that "requiring those for whom a magistrate or grand jury has found probable cause that they have committed crimes of violence to be subject to a hearing before release from involuntary commitment is rationally related to the protection of persons from violent crimes," and that requiring a court hearing to determine the appropriateness of the release of such persons does not deprive them of equal protection of the laws. 63 N.C.App. at 706-07, 306 S.E. 2d at 512. The Supreme Court of North Carolina dismissed appellant's appeal on this basis. Since the statutory amendment at issue clearly bears a fair and substantial relation to the object of the legislation, no substantial federal question is involved here.

II. There is no substantial Federal question involved where, under the facts of this case, state statutes require a court hearing to release a civilly committed respondent previously charged with a violent crime and found incapable of proceeding, although the respondent has already been charged, found incapable of proceeding and civilly committed prior to the effective date of the statutes in question.

Appellant also contends that the provisions of N.C. Gen. Stat. § 122-58.7A, et seq. (1983) governing appellant's release from civil commitment may not be applied to those initially committed to a mental health facility prior to the effective date of the legislation, because to do so would constitute an ex post facto law prohibited by Article I, Section 10 of the United States Constitution. Appellant

thus maintains that the application of this statutory amendment to the case sub judice has the effect of prolonging his "incarceration" and therefore increases the punishment for the crime in violation of the constitutional prohibition.

In Dobbert v. Florida, 432 U.S. 282, rehearing denied, 434 U.S. 882 (1977), this Court held that the Constitution prohibits as ex post facto a statute which either "punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed." Id. at 292, citing Beazell v. Ohio, 269 U.S. 167 (1925). However, even though a procedural change may work to the disadvantage of a defendant, it is not ex post facto. Id.; Beazell v. Ohio, 269 U.S. 167. The constitutional prohibition limits the powers of the states only with regard to the imposition of punishment, and legislation has been held not to violate the prohibition against ex post facto laws when it was not penal in character. Bankers Trust Co. v. Blodgett, 260 U.S. 647 (1923).

The North Carolina Court of Appeals held below that the statutory amendment in question applied to appellant but did not violate the prohibitions against ex post facto laws found in either the United States or North Carolina Constitutions. The court based its opinion on the grounds that the relevant procedures did not constitute punishment for a crime but merely concerned the discharge of a patient from a mental health facility. This conclusion is consistent with the decisions reached by the courts of other states holding that statutes providing for the commitment of persons acquitted of a crime by reason of insanity, which commitment is imposed not as

punishment but for the protection of society and treatment of the individual, do not violate the prohibition against ex post facto laws when applied to a case in which the crime was committed before the commitment statute was passed. Ex parte Clark, 86 Kan. 539, 121 P. 492 (1912); see People v. Chapman, 301 Mich. 584, 4 N.W. 2d 18 (1942).

An examination of the facts of the instant case reveals that this constitutional prohibition clearly does not apply here. N.C.Gen.Stat. § 122-58.7A, et seq. (1983) does not involve either incarceration or punishment as contended by appellant. The statutory amendment at issue is not criminal in nature but merely provides for a prompt judicial determination of the appropriateness of a respondent's discharge from involuntary hospitalization. The appropriateness of this discharge is determined by the same legal standard that governs all civil commitments. See N.C.Gen.Stat. § 122-58.13(1983). Nor does the statutory amendment require that respondents falling within this classification be held longer than other committed patients prior to discharge from the facility. Instead, N.C.Gen. Stat. § 58.13(b)(1983) merely states that fifteen days before the facility intends to discharge such a respondent, the chief of medical services shall notify the clerk of superior court who must then schedule a rehearing to determine the appropriateness of the respondent's release. Such a discharge date is normally the subject of considerable prior planning by the treatment staff concerned. The clerk shall subsequently notify the chief district judge and other appropriate persons of the time and place of the hearing, as must be done for any rehearing governing this class of respondents. See N.C.Gen.Stat. § 122-58.11(a)(1983). In balancing the rights of the public with those of a respondent committed by reason of being charged with a violent crime, these provisions for notice and a judicial

hearing would not adversely affect a respondent substantially nor would they violate his constitutional rights. See People v. Jones, 114 Misc. 2d 31, 449 N.Y.S. 2d 409 (1982).

This lack of any adverse consequences is particularly clear in appellant's case, since appellant is a chronic mental patient civilly committed to John Umstead Hospital prior to, at the time of and since the commission of the offense. Here, the chief of medical services has never requested a court hearing to determine the appropriateness of appellant's release. Since the statutes in question are not criminal in nature and neither have had nor will have any detrimental effect on appellant, there is no substantial federal question involved here.

CONCLUSION

WHEREFORE, for the above-stated reasons, it is respectfully submitted that this appeal should be dismissed.

Respectfully submitted, this the 24th day of February, 1984.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion to Dismiss Appeal was this day served upon counsel for appellant by mailing a copy thereof, first class postage prepaid, addressed as follows:

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This the 24th day of February, 1984.

William F. O'Connell
Special Deputy Attorney General